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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS BROADCAST MUSIC, INC., *et al.*

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OPINIONS BELOW

The majority and separate opinions of the court of appeals are reported at 562 F.2d 130. (Pet. App. 1a, 23a.)[1]

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[1] References to "Pet. App." are to pages of the separate appendix to the petition for a writ of certiorari filed by petitioners Broadcast Music, Inc. ("BMI"), et al. References to "A." are to volumes and pages of the appendix to the briefs filed pursuant to the Court's order of November 6, 1978.

Upon the denial of petitions for rehearing, Judge Moore issued an opinion which is unreported. (Pet. App. 125a.) The opinion of the district court dismissing the complaint after a full trial on the liability issues is reported at 400 F. Supp. 737. (Pet. App. 24a.)

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1977. (Pet. App. 122a.) Timely petitions for rehearing and suggestions for rehearing in banc were denied on December 6, 1977. (Pet. App. 124a.) On February 17, 1978, and March 1, 1978, Mr. Justice Marshall extended the time to file the petitions until May 5, 1978, and petitions for certiorari were filed on that date by two groups of petitioners. On October 2, 1978, this Court granted the petitions and ordered that the cases be consolidated. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides, in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ."

QUESTIONS PRESENTED

A television network desiring to perform any musical composition in the BMI repertory may obtain a performance license from the individual copyright owner, who would willingly negotiate with the network. The questions presented are:

1. Whether it is per se unlawful price fixing under the Sherman Act for BMI, an independent middleman, to offer to users the alternative of a blanket license to perform all of the music in the BMI repertory?

2. Whether it is misuse for a copyright owner, as an alternative to direct licensing, to allow BMI, an independent middleman, to license his music?

STATEMENT OF THE CASE

1. The Parties

Petitioner BMI, a defendant below, is a corporation organized to offer licenses to users of music who make nondramatic public performances of copyrighted music. BMI has negotiated agreements with more than 33,000 composers and authors[2] of music and more than 16,000 music publishing companies permitting BMI to offer licenses to perform their works. These writers and publishers are

[2] We will often use the term "writers" to include both composers of music and authors of lyrics.

commonly referred to as BMI "affiliates." Several writer and publisher affiliates of BMI [3] were named in the complaint as representatives of a defendant class of BMI affiliates and are petitioners here.

Petitioner American Society of Composers, Authors and Publishers ("ASCAP"), also a defendant below, is a membership organization of writers and publishers of music which was founded in 1914. ASCAP's membership consists of approximately 16,000 writers and 6,000 publishers. Several writer and publisher members of ASCAP were named in the complaint as representatives of a defendant class of ASCAP members and are likewise petitioners here. (1 A. JA19.)

Respondent Columbia Broadcasting System, Inc. ("CBS"), the plaintiff below, is perhaps the principal user of music in the world. As the owner of one of the three national television networks, CBS purchases or produces television programs which it supplies to the five major television stations it owns and the approximately 200 television stations which are affiliated with CBS. CBS also owns and operates fourteen radio stations, one of the four national radio networks, and the world's largest record company. In addition to its activities as a licensee of music, CBS is a significant licensor of music. CBS owns several substantial music publishing companies, each of which is a member of ASCAP or an affiliate of BMI. (Pet. App. 27a-28a, 57a-58a, 90a, 93a.)

[3] Paul Anka, Jerry Bock, Fred Ebb, Norman Gimbel, Sheldon Harnick, John Kander, Charles Koppelman, Don Rubin, Joseph Stein, Al Gallico Music Corp., Associated Music Publishers, Inc., Duchess Music Corp., Edward B. Marks Music Corp., Hill and Range Songs, Inc., Hollis Music, Inc., Maclen Music, Inc., Peer International Corp., Screen Gems-Columbia Music, Inc., Sunbeam Music, Inc. and Unart Music Corp.

2. BMI's Organization and Operation

BMI was organized in 1939 by CBS and a number of other broadcasters to provide competition to ASCAP in bulk music licensing and to provide a licensing outlet for writers of forms of music such as country and blues, to which ASCAP was not then receptive. CBS disposed of its BMI stock in 1959; all of the approximately 485 holders of BMI stock today are local broadcasters or their successors. BMI pays no dividends to stockholders; all of its revenues after expenses and reserves are paid out to writers and publishers. (Pet. App. 2a, 27a; 15 A. 4247-48.)

Writers and publishers affiliated with BMI have no ownership interest in BMI. They do not sit on BMI's Board of Directors or its Executive Committee. They exercise no control whatever over BMI's prices or policies. (Pet. App. 2a, 27a; 15 A. 4247-49.)

BMI is a classic middleman. It acquires from many writers and publishers rights to grant licenses to their music and offers users licenses in bulk, providing them with an alternative to direct negotiation for public performance rights with the individual owners of the music.

a. BMI's Contracts With Writers and Publishers

Each BMI writer or publisher affiliate has entered into an agreement with BMI giving BMI a right to issue copyright licenses to music users to publicly perform the affiliate's works.[4] (*E.g.*, Plaintiff's Exhibit ("PX") 471A, 21 A. E578, 15 A. 4300; PX 472, 21 A. E588, 15 A. 4294-95.)

Generally, the affiliation agreements provide for payments to the affiliate in accordance with BMI's published payment schedules as they exist or come into effect during

[4] The agreement covers not only existing works but also works created or acquired during the term of the agreement. (21 A. E578 at ¶ SECOND, 15 A. 4300; 21 A. E588 at ¶ 1, 15 A. 4294-95.)

the course of the agreement. However, the agreements are subject to individual negotiation, and a number of them provide for payments of advances, guarantees, or bonuses in various amounts. (PX 451, 11 A. 3146-48; PX 452, 11 A. 3146-48; PX 453, 11 A. 3146-48; 3 A. 263; 13 A. 3816-20; 15 A. 4327-31, 4352.)

The payment schedules, which are modified frequently by BMI, generally provide for payments based on number of performances as determined by a census of television network performances and a sampling of performances by other broadcast licensees. However, the rate of payment may vary depending on such factors as the nature of the use (*e.g.*, a feature song, a program theme, or background music), the time of day, the nature of the user (*e.g.*, local radio station or television network), the number of past performances of the work, and the overall number of performances of that affiliate's works. The payment schedules are subject to change by BMI at any time without the consent of its affiliates. (*E.g.*, PX 469, 21 A. E564, 15 A. 4346; PX 470, 21 A. E571, 15 A. 4346; 15 A. 4255a-56.)

Payments to affiliates bear no direct relationship to the amount which BMI receives from any particular licensee. (PX 484, 12 A. 3570-71; 15 A. 4327.) Indeed, in a given year BMI may pay out more with respect to performances than it takes in. (PX 531, 12 A. 3549.)

While each BMI affiliate has authorized BMI to license music users who prefer to deal in bulk, each affiliate remains free to issue licenses for the performance of his compositions to music users who prefer to deal directly with copyright owners. Paragraph IV(A) of the consent decree entered in *United States* v. *Broadcast Music, Inc.*, [1966] Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966) (the "BMI Decree"), requires that BMI permit its affiliated writers and publishers to issue performance licenses directly to music users.[5] (Pet. App. 43a; BMI Exhibit ("BX") 114, 24 A. E1569, 16 A. 4681-87; 15 A. 4348-49.) The court of appeals affirmed the district court's finding that BMI's affiliates can, and would if CBS asked, negotiate and issue performance licenses directly to CBS. (Pet. App. 8a-10a, 111a-120a.)

b. *BMI's Licenses With Music Users*

By drawing upon the rights granted to it under its various affiliation agreements, BMI can offer to music users a single license which covers all the works of all its affiliates. This group of more than one million compositions is generally referred to as the "BMI repertory."

The most popular form of license BMI offers to broadcasters is the "blanket" license, which authorizes the user to perform any work in the BMI repertory, without advance notice to either BMI or the copyright owner, any number of times during the term of the license.[6] In return, BMI receives a fee which may be either a flat dollar amount or a percentage of specified kinds of receipts of the licensee. (*E.g.*, ASCAP Exhibit ("AX") 126, 22 A. E889, 15 A. 4497-98; Pet. App. 3a, 6a, 26a.)

BMI also offers broadcasters, pursuant to paragraph VIII(B) of the BMI Decree, a "per program" (or "per programming period") license. (24 A. E1574, 16 A. 4681-

[5] The current consent decree was entered into after a suit was commenced by the Department of Justice in 1964 alleging that BMI and its broadcaster-stockholders had attempted to monopolize the business of granting public performance licenses to broadcasters. BMI had been operating under a prior consent decree since 1941. *United States* v. *Broadcast Music, Inc.*, [1941-1943 Transfer Binder] TRADE REG. REP. (CCH) ¶ 52,516 (E.D. Wis. 1941).

[6] Blanket licensees also obtain the right to perform the works of the foreign writers whose works are available through BMI under reciprocal licensing arrangements with foreign performing rights organizations.

87.) This license is a form of blanket license in that the broadcaster receives unlimited access to the entire BMI repertory; however, a license fee is payable only with respect to programs (or programming periods) during which BMI music is actually performed. (Pet. App. 6a-7a, 32a.) The BMI Decree requires that the fee differential between blanket and per program licenses be "justifiable by applicable business factors." (Pet. App. 32a; 24 A. E1574, 16 A. 4681-87.)

Writers and publishers play no role in determining the price BMI will charge for a license. The fee for a BMI license is exclusively a matter for negotiation between BMI and the music user.[7] (Pet. App. 115a.)

3. Prior Proceedings

a. Background

When CBS filed this action attacking blanket licensing on December 31, 1969, CBS had held blanket licenses from BMI and ASCAP for its television network for 23 years. In all of this period, CBS had never sought a per program license for its television network,[8] nor had it ever sought public performance rights directly from ASCAP members or BMI affiliates.[9] (Pet. App. 2a, 27a-28a, 50a-54a, 62a-63a, 73a, 109a-111a; AX 126, 22 A. E889, 15 A. 4497-98; AX 127, 22 A. E908, 15 A. 4497-98.)

This lawsuit was commenced after negotiations between BMI and CBS collapsed over the amount of fees CBS was

[7] Since BMI is prohibited by the BMI Decree from discriminating between users similarly situated (¶ VIII(A)), in practice BMI often negotiates on license terms with industry groups of users. (24 A. E1574, 16 A. 4681-87; 15 A. 4254-55.)

[8] At the time of suit, CBS had held a per program license for its radio network since 1959. (BX 101, 15 A. 4253-54.)

[9] Indeed, when it led the group which founded BMI, CBS caused BMI to issue blanket licenses.

willing to pay for a blanket license. During the discussions, CBS never sought anything but a blanket license. BMI sought increased fees to reflect CBS' increased use of music in the BMI repertory. When negotiations proved unsuccessful, BMI gave the contractual 60 days' notice of termination of the blanket license. (Pet. App. 51a-54a.) As has unfortunately become all too common, CBS responded to a business problem not with a business answer but with a lawsuit.[10] (Pet. App. 112a.)

b. Proceedings in the District Court

Ironically, CBS, which had refused to pay BMI for its increased usage of the BMI repertory, complained to the district court that its blanket license fees did not vary with the amount of music it used. CBS alleged that BMI and its affiliates and ASCAP and its members had violated Sections 1 and 2 of the Sherman Act by compelling CBS to take blanket licenses and requiring CBS to "pay royalties on a basis which does not bear any relationship to the

[10] This is an excellent example of use of the litigation process itself to gain business objectives so that the litigant is benefited even if it loses the suit. Under color of its antitrust complaint, CBS refused to pay BMI or BMI affiliates anything at all for use of music in the BMI repertory. When BMI sought injunctive relief, CBS was required to pay only at the 1969 rate (subject to adjustment at the end of the case) which BMI had rejected as inadequate. By this tactic alone, CBS has thus far been able to pay BMI nearly $6 million less than another network has paid during the period of this suit. Furthermore, by pleading its antitrust complaint in the form of a misuse defense, CBS has prevented trial of a state court suit by BMI for the period prior to 1970 in which BMI seeks nearly $5 million, exclusive of interest, under the licensing agreement then in effect. After the district court dismissed CBS' complaint, but before the court of appeals' reversal, Judge Lasker enjoined CBS from relitigating the misuse claims in the state court, stating that CBS' suggestion that further delay would not injure BMI was "fanciful." *See Broadcast Music, Inc.* v. *CBS Inc.*, 424 F. Supp. 799 (S.D.N.Y. 1976). *See also Federal Judge Assails CBS on Delay Tactic*, N.Y. Law Journal, December 13, 1976, at 1, col. 4.

amount of music performed." CBS alleged that it would be "wholly impracticable" for it to acquire an adequate supply of performance rights directly from copyright owners. CBS demanded injunctive relief requiring that BMI and ASCAP grant CBS what it termed "per-use" licenses[11] and a declaratory judgment that the copyrights on the compositions in the BMI and ASCAP repertories had been misused and were unenforceable against CBS. (Pet. App. 33a; 1 A. JA25, JA28-29.) CBS' demand for injunctive relief was later modified to include a request, as an alternative to a per use license, for an order forbidding BMI and ASCAP to offer blanket licenses to any television network. (Pet. App. 3a, 25a.)

Following three years of discovery, a 29-day trial on issues of liability was held before Judge Morris E. Lasker of the Southern District of New York. On September 22, 1975, Judge Lasker filed a lengthy and careful opinion rejecting CBS' theories of fact and law. (Pet. App. 24a-121a.) Judge Lasker "painstakingly" (Pet. App. 2a) reviewed the extensive record[12] and concluded that the offering of blanket licenses by BMI and ASCAP did not unreasonably restrain trade and did not violate the antitrust or copyright laws. (Pet. App. 114a-120a.) CBS had failed to prove that defendants had placed any artificial price or supply restrictions upon the ability of CBS to acquire performance rights directly from copyright owners at competitive market prices. (Pet. App. 43a, 112a, 115a, 117a, 118a, 120a.) CBS

[11] Over the course of the litigation, CBS modified its definition of a per use license on numerous occasions, but it remains a bizarre concoction under which a copyright holder would not only be required to bid against himself, but also would be restricted to ever-lowering court-fixed ceiling prices. (Pet. App. 38a n.7.) The per use license is described in more detail at pp. 30-32, *infra*.

[12] The record consisted of the testimony of thirty witnesses (filling nearly five thousand pages of transcript), portions of twenty-four depositions and more than five hundred exhibits.

had failed to prove that defendants had combined or conspired to compel CBS to take blanket licenses from either BMI or ASCAP. (Pet. App. 114a-117a.)

The district court analyzed the market for performing rights:

> "Because of the multitude of performances of music they generate each year, virtually all radio stations and television networks secure the rights to perform the music they use by a 'blanket' license. An ASCAP blanket license gives the user the right to perform all of the compositions owned by its members as often as the user desires for a stated term, usually a year. Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is 'automatically' covered by the blanket license."

(Pet. App. 26a.)

The court's conclusion that CBS was not compelled to accept blanket licenses, but instead could rely on direct licenses, was based on extensive findings as to the nature and origin of the music used on network television. Most of the music performed on CBS' television network programs is composed especially for those programs by persons hired by the program producer expressly for that purpose. CBS could readily obtain direct licenses for performance rights to that music. As to other music used, CBS would have no particular difficulty in seeking out and negotiating with the copyright owners. CBS program producers al-

ready acquire synchronization rights[13] from all of the owners of the music used on the network. (Pet. App. 66a.) Should CBS ever decide to forego supplying its needs through BMI and ASCAP blanket licenses, it would be able to obtain licenses directly. (Pet. App. 28a, 56a-61a, 63a, 69a-79a, 111a-112a.) And if for any program direct licenses could not be negotiated or were not desired, a BMI or ASCAP per program license, requiring payment of a license fee with respect to that program only, would be available. (Pet. App. 109a-111a.)

The district court rejected CBS' claims that the continued offering of blanket licenses by BMI and ASCAP would have an anticompetitive effect on any price negotiations CBS might seek to conduct with individual copyright owners. (Pet. App. 115a-120a.) Judge Lasker found that:

> "CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them."

(Pet. App. 115a.)

> "CBS has failed to prove either that it purchased blanket licenses under compulsion or that the price it paid was fixed. To the contrary, the record establishes that CBS has always negotiated the price for its licenses with ASCAP and BMI. Moreover, CBS has not established that the individual defendants are unwilling to sell performance rights on a direct licensing basis at a negotiated price for each license."

(Pet. App. 115a; footnote omitted.)

> "CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. We have found that copyright proprietors would deal readily on a price basis; certainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place."

(Pet. App. 119a-120a.)[14]

[13] Synchronization rights are rights to record music in synchronization with film or videotape. (Pet. App. 67a.)

c. Proceedings in the Court of Appeals

CBS' appeal was heard by Circuit Judge Gurfein and Senior Circuit Judges Moore and Anderson[15] of the Court of Appeals for the Second Circuit on October 14, 1976.

On August 8, 1977, the Second Circuit reversed the district court in part. (Pet. App. 1a-23a, 122a-123a.) While the court of appeals affirmed the dismissal of most of CBS' antitrust claims[16] and did not disturb any of the extensive findings of fact made by the district court, Judges Gurfein and Anderson joined in ruling that, "with respect to the television networks," the offering of blanket licenses by BMI and ASCAP constituted per se unlawful price fixing.[17]

[14] The district court also found that CBS had failed to prove any threat of loss or damage sufficient to justify the issuance of the injunctive relief requested even if it were assumed, "contrary to the evidence," that CBS had proved a violation of the antitrust laws. (Pet. App. 120a-121a.)

[15] Judge Anderson died shortly after the petitions for rehearing were decided.

[16] The district court found that CBS had failed to prove that there was any unlawful tying, group boycott, or monopolization. (Pet. App. 116a-120a.) The court of appeals upheld these rulings. (Pet. App. 8a-11a, 23a n.29.)

[17] Judge Moore filed a separate opinion in which he disagreed that price fixing had been proven but, paradoxically, concurred in the decision to remand for proceedings on relief. (Pet. App. 23a.) *See also* Judge Moore's opinion on the denial of petitions for rehearing, in which he voted to deny rehearing, but observed that the central premise of the majority's opinion on the merits was "unsupported by proof." (Pet. App. 125a.)

(Pet. App. 21a.) In addition, in the last sentence of the final footnote to its opinion, the court reversed the dismissal of the copyright misuse claim "for essentially the same reasons" that had led it to reverse the district court's dismissal of the price fixing charge. (Pet. App. 23a n.29.)

On December 6, 1977, the Second Circuit denied petitions for rehearing and suggestions for rehearing in banc.

SUMMARY OF ARGUMENT

The court of appeals insisted on applying a rule of per se illegality to blanket licensing even though

—it conceded that the blanket license was not a "naked restraint";

—it recognized that blanket licenses were reasonable and necessary in many circumstances;

—it held that blanket licenses were not "generally . . . unlawful";

—no judicial resources could be conserved, because a full rule of reason trial had already taken place;

—blanket licenses were required by government consent decrees; and

—every governmental agency that has studied music licensing in recent years has concluded that the performing rights organizations and the blanket licenses they offer provide a useful and necessary solution to the unique market problems in the music licensing business.

The court compounded its error by ordering as "relief" a per use license which would place highly improper re-

straints on the licensing market by imposing a system of ever-lowering artificial ceiling prices.

Evaluating blanket licensing by the rule of reason test that this Court has applied to other joint selling arrangements, the district court properly found that blanket licenses imposed no unreasonable restrain of trade. CBS did not have to deal with BMI and ASCAP; it could deal with writers and publishers directly. The blanket licensing alternative would not improperly influence the prices that would be charged in direct licensing transactions or encourage users not to deal with CBS. The court of appeals affirmed these findings and should have affirmed the conclusion that flows from them: blanket licenses do not unreasonably restrain trade.

The Second Circuit should not have recognized a doctrine of copyright misuse. The market exclusionary effects of patents and the vast sums at stake in patent suits find no parallels in the typical copyright case. Rather than extending the patent misuse doctrine to copyrights, the court should have applied to copyrights the ordinary rule that a person cannot rely on an antitrust defense to get something for nothing.

In any event, a misuse finding was totally inappropriate in the context of this case, where defendants had done no more than license in the historically accepted manner in accordance with the requirements of government consent decrees.

ARGUMENT

I. THE OFFERING OF BLANKET LICENSES BY BMI SHOULD NOT HAVE BEEN JUDGED BY PER SE RULES.

Per se rules of illegality are applied to conduct that experience has shown to be inherently bad, so that inquiry into its precise effects would not be worthwhile. Per se rules are thus designed to provide sure behavioral guides to businessmen and to avoid lengthy inquiries into practices that are plainly anticompetitive. *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355, 1365 (1978); *United States* v. *Container Corp. of America*, 393 U.S. 333, 340-41 (1969) (Marshall, J., dissenting); *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). Here, the court of appeals applied a per se rule even though it found blanket licensing not inherently bad, even though the goals of predictability and conservation of judicial resources could not be achieved, and even though the practices complained of are of the kind traditionally tested under the rule of reason.

This Court has recently reaffirmed that "[p]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977). In *Northern Pacific Railway Co.* v. *United States*, the Court described conduct which was appropriate for per se treatment:

> "agreements or practices which because of their pernicious effect on competition and *lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to

> the precise harm they have caused or the business excuse for their use."

356 U.S. at 5 (emphasis added).

Justice Stevens' opinion in the recent case of *National Society of Professional Engineers* v. *United States* contains a similar formulation:

> "agreements whose *nature* and *necessary effect* are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . are 'illegal per se' . . . ."

98 S. Ct. at 1365 (emphasis added).

We believe that there are few, if any, cases to come before this Court in recent years in which application of per se rules was less appropriate than in this one. The Second Circuit branded the blanket license illegal per se while at the same time conceding that it was *not* a "'naked restraint.'" (Pet. App. 22a.) The court declined to order that blanket licenses be enjoined, recognizing that there are users who "deem the blanket license desirable," (Pet. App. 22a) and that for certain types of users blanket licenses are essential. (Pet. App. 13a-16a.) Indeed, the court said, "we, in no way, intimate . . . that the blanket licenses given by ASCAP [and BMI] generally are unlawful." (Pet. App. 21a n.26.)

The recognition that blanket licenses offered by BMI and ASCAP are highly valuable in some circumstances refutes the essential premise for the application of the per se label. Clearly, the Second Circuit did not find that blanket licenses "lack . . . any redeeming virtue."

Further, in holding that the offering of blanket licenses was per se illegal the Second Circuit did not achieve any of the efficiency goals of per se rules. Conservation of trial time was hardly a factor since the district court had al-

ready conducted an exhaustive rule of reason trial. *See Mackey* v. *National Football League*, 543 F.2d 606, 619-20 (8th Cir. 1976), *cert. dismissed pursuant to Rule 60*, 434 U.S. 801 (1977). The goal of predictability was hardly protected by holding per se unlawful practices which were required by government consent decree and had been openly engaged in by thousands of writers and publishers for decades. The result could hardly have been more startling. Nor was predictability advanced by the enunciation of an "exception" to the per se rule in which the legality of the practice turns on the "market necessity" of the practice to the buyer (Pet. App. 13a-16a), or by the ruling that a practice is per se illegal which is not "generally" unlawful. (Pet. App. 21a-23a.)

Finally, the Second Circuit applied a per se rule to conduct which historically had always been tested by the rule of reason, and then compounded the error by assuming that BMI was organized in the same way as ASCAP. ASCAP, of course, is a classic joint selling agency, a group of competitors who license their property as a package and distribute the revenues among themselves. Judges Gurfein and Anderson characterized this as per se unlawful price fixing:

> "the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition."

(Pet. App. 11a; footnote omitted.)

This Court, however, has recognized that there are often important justifications for joint selling activities and has always tested them under the rule of reason. When presented with joint delegation of pricing decisions to an

agency controlled by a group of competitors, or with an express agreement among competitors as to the prices at which they would buy or sell during a given part of the business day, this Court has looked to the purpose, effect and industry context of such agreements, and often upheld them under the rule of reason. *See Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 163 (1931); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918).

In *Standard Oil Co. (Indiana)* v. *United States*, the Court was confronted with agreements among licensors of interlocking patents on a price for a license to all of the patents and on a formula for division of the proceeds. The Court noted that each patent owner

> "was to share in some fixed proportion the fees received under these multiple licenses. The royalties to be charged were definitely fixed in the first contract; and minimum sums per barrel, to be divided between the Texas and Indiana companies, were specified in the second and third."

283 U.S. at 168. Despite the obvious impact of these agreements on price, the threshold question whether such agreements should be judged by per se rules was answered in the negative. The Court stated that, "Such contracts must be scrutinized to ascertain whether the restraints imposed are regulations reasonable under the circumstances . . . ." *Id.* at 169. The Court then proceeded to find that the agreements did not violate the antitrust laws because each competitor retained the right to issue individual licenses. *Id.* at 170-71. Here, the Second Circuit should have applied the same kind of analysis to the joint selling activities of ASCAP.

Although plainly erroneous, the Second Circuit's analysis with respect to ASCAP did at least proceed from the fact of an organization of competing sellers allocating revenues among themselves. But in applying its per se ruling to BMI,[18] the Second Circuit acted wholly without any rationale.

BMI is not a membership organization of writers and publishers. It is an independent corporation. BMI's writer and publisher affiliates own no stock in BMI and have no role in BMI's operation or management; each has only an individual contract with BMI, and none participates in decisions as to how license receipts will be distributed. BMI acts as an ordinary middleman, making its own decisions on how much it will pay its suppliers and how much it will charge its customers. No prior case has ever characterized these ordinary activities of a middleman as price fixing.

II. THE OFFERING OF BLANKET LICENSES PROVIDES A COMPETITIVE ALTERNATIVE AND DOES NOT UNREASONABLY RESTRAIN TRADE.

In deciding to apply per se rules to the offering of blanket licenses, the Second Circuit discussed the question whether the blanket license improperly affected direct license prices. It is of course true that any conduct—of joint selling agencies or others—which may improperly affect price may ultimately be found to violate the antitrust laws. Such conduct, however, is subject to analysis under the rule of reason rather than under per se rules.[19]

[18] The Second Circuit said in a footnote: "The references hereafter to ASCAP or appellant [*sic*] shall be taken to include BMI, unless the context clearly indicates otherwise." (Pet. App. 2a n.1.)

[19] The Second Circuit misread *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), as holding that any practice which affects price is per se unlawful price fixing. In fact, what the case holds is that an agreement whose *purpose* is to fix prices is per se unlawful even if price is not an express term of the agreement. Thus this Court stated:

> "[A] combination formed for the *purpose* and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*. . . . Proof that a combination was formed for the *purpose* of fixing prices and that it caused them to be fixed or contributed to that result is proof of . . . a price-fixing conspiracy . . . ."

Id. at 223-24 (emphasis added).

See, e.g., United States v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978); *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975); *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969); *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553 (1936); *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588 (1925); *Maple Flooring Manufacturers Association* v. *United States*, 268 U.S. 563 (1925).

The district court saw nothing inherently evil in the offering of blanket licenses, and hence properly tested blanket licenses under the rule of reason The trial court's rule of reason analysis of the facts led to the conclusion that blanket licenses have no improper effect on direct licensing prices and provide a reasonable solution to the unique problems of music licensing. And this evaluation by the district court is shared by the many governmental agencies that have carefully considered the music licensing business.

A. The Blanket License Is a Response to the Needs of a Market Created by Congress.

A market in music performance rights exists because Congress determined that it was desirable that there be such a market. In carrying out its purpose to "stimulate artistic creativity for the general public good," *Twentieth*

Century Music Corp. v. *Aiken,* 422 U.S. 151, 156 (1975), Congress elected not to award subsidies but rather to create conditions under which a market could develop. Markets in tangible goods arise without the need for legislative encouragement, because sellers of tangible goods can retain possession until they are compensated. But a market in musical compositions cannot arise if the composition may be appropriated by anyone who simply hears it performed. Hence, Congress has made it a civil and criminal offense to publicly perform copyrighted music without the copyright owner's permission. *See* 17 U.S.C. §§ 501-06. This power to prevent use by others was not designed to discourage the performance of copyrighted music; rather, it was intended to encourage creation by offering the possibility of market rewards, thereby securing "the general benefits derived by the public from the labors of authors," *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 127 (1932). The market place thus determines which creators will be compensated for their works.

There is a very active worldwide market in music performance rights. More than 70,000 writers and publishers are affiliated with BMI or are members of ASCAP; thousands more foreign individuals and firms license through the more than thirty other performing rights organizations in other countries. The works of these writers and publishers are licensed to thousands of music users, including concert halls, night clubs, background music services, and radio and television stations and networks.

Because of the nature of music and the large numbers of buyers and sellers, trade in the market is largely carried out through bulk licensing intermediaries rather than face to face between creators and music users. Even a small music user such as a neighborhood tavern with a piano

player on weekends may need access to works of numerous composers throughout the world. As songs change in popularity, rights to additional songs may be required. Moreover, it may be difficult to know in advance which compositions need to be licensed, since the piano player may play requests or spontaneously perform a composition not in his regular repertory.

The amount the tavern owner can afford to pay for music rights is limited by the extra receipts he can earn by having the piano player. Even if the tavern owner could obtain licenses for a few cents apiece, the task of seeking out the numerous, widely scattered publishers of the compositions involved and negotiating the licenses would vastly exceed the amount available for the purpose. The same transaction costs would deter the publishers from seeking out the tavern owner to solicit licenses.

These market characteristics do not change appreciably even with larger users such as local radio stations. Their budgets for music—at least as measured by what they have traditionally paid BMI and ASCAP for blanket licenses—would be insufficient to cover the transactional expenses of direct negotiation, even if they could identify sufficiently in advance the compositions they needed.

These, then, are the principal market characteristics which make direct licensing impractical for most music users: (a) rights to a large number of songs are needed; (b) it is difficult to predict in advance what rights will be required; and, most importantly, (c) the transaction costs in obtaining rights to individual songs are prohibitively high in relation to the value of the rights. These barriers to direct licensing are natural barriers which would act as a deterrent to direct licensing without regard to whether

or not bulk licensing organizations such as BMI or ASCAP were in existence.

If BMI and ASCAP did not exist, the natural barriers would result in the acquisition of far fewer public performance licenses—with the consequence that users would either perform less music than they would prefer, or perform some music without the licenses necessary to avoid civil and criminal liability. BMI and ASCAP thus exist because they fill a definite and clear market need. By offering blanket licenses which substantially eliminate transaction costs, BMI and ASCAP can give the user access to the music he needs at a price he can afford and can give him the flexibility to perform spontaneously a broad range of music without fear of infringement. At the same time, they can provide compensation to those who create the music.

The district court summarized the virtues of the blanket license as follows:

> "[I]t provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is 'automatically' covered by the blanket license."

(Pet. App. 26a.) The reliance of most users on BMI and ASCAP as middlemen reflects the decisions of those users that dealing in bulk is better than dealing individually or doing without music.

The court of appeals thought that it perceived a way in which the availability of blanket licenses had the effect of making direct licenses less available. The court of appeals majority assumed *a priori* that the method by which television network music is to be licensed is within the control of the owner of the music. Apparently unaware of the extensive record evidence to the contrary, the court posited that

> "the very availability of the blanket license . . . must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete."

(Pet. App. 20a; emphasis in original.)

The record shows, and the district court found, that this proposition is utterly false. The availability of the blanket license gives the power of choice to the user of music, not to the copyright owner. The network determines what music it wants; the selection of music is made by the network or the program producer. (Pet. App. 56a-61a, 63a-64a, 67a-69a, 72a, 90a-93a, 103a, 108a, 112a.) Further, there is a high degree of interchangeability among songs suitable for network television use, and if a particular song is not available, there are any number of suitable alternatives. (Pet. App. 48a, 92a, 119a-120a.) If a copyright owner will not license by the method the network wants, other music will be substituted and his music will not be used. (Pet. App. 89a-93a, 105a-106a, 108a, 112a, 119a-120a.) Hence, the power to make the music selection gives the network the power to determine the licensing method.

So long as a user elects to employ blanket licenses, the copyright owner has no occasion to seek direct sales to that

user, since the user does not want to buy two licenses for the same music. When a user chooses not to take a blanket license, the copyright owner must compete for direct sales to that user if he wants his music used. Literally and figuratively, it is the network which calls the tune. The blanket license is simply not an option that belongs to the copyright owner, and its availability does not affect the availability of direct licenses.

Furthermore, the availability of direct licenses has a constraining effect on the prices that BMI and ASCAP can charge for blanket licenses.[20] Although blanket licenses are now regarded by network users as less expensive than direct licensing, if the royalty fees and administrative expenses of blanket licensing became higher than the royalty fees and administrative expenses of direct licensing, music users could, and would, elect to license directly. Thus, the availability of direct licensing places a significant constraint on the price of blanket licenses. As all the expert economists who testified at trial recognized, this constraint

[20] CBS advanced the reverse proposition, arguing that in direct licensing transactions copyright owners would ask for fees equal to what they would receive if CBS continued to use blanket licenses. Both of the courts below rejected this contention:

> "We recognize that CBS contends that a blanket licensing system overhanging the market in any combination of circumstances will necessarily affect the price for each set of individual performing rights. On this record we are not convinced that this is necessarily so. And the District Court found the contrary.
>
> "CBS has asserted that an individual member of ASCAP, thrown into a direct negotiating market for the first time, will tend to measure the royalty he asks for a particular performing right by the royalty he has actually been receiving from ASCAP as his share under the blanket license. Considering the counterforce of the strong bargaining power of CBS, we cannot accept this as more than a theoretical assumption."

(Pet. App. 22a n.27.)

constitutes price competition even though users have not actually gone out and solicited price quotations for direct licenses. (8 A. 1670; 14 A. 3982; 15 A. 4384-85.)

In *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), the Court of Appeals for the Ninth Circuit was presented with an antitrust attack on ASCAP's offering of blanket licenses, again based on a record devoid of proof of anything beyond the mere existence of ASCAP as a bulk licensor of music. In one of two alternative grounds,[21] the Ninth Circuit held that ASCAP did not unreasonably restrain trade because there was no proof of any artificial restrictions on the availability of the direct licensing alternative. 372 F.2d at 4. This unimpaired availability of direct licensing is sufficient assurance that blanket license prices are being limited by the operation of competitive forces. The fact that users have overwhelmingly chosen blanket licenses in no way diminishes the existence of those competitive forces.[22]

CBS has argued that direct licenses are not truly available because individual writers and publishers of music

[21] The other ground was based on a provision of the ASCAP consent decree not present in the BMI Decree.

[22] The Second Circuit attempted to distinguish *K-91* and harmonize the result of that decision with its own price fixing ruling. (Pet. App. 13a-17a, 21a n.26.) Although the Ninth Circuit had not relied upon, or even mentioned, the stipulation involved, the Second Circuit pointed out that the parties in *K-91* had stipulated that the defendant, a local radio broadcaster, would have found it "'commercially, practicably and virtually impossible . . . to acquire a separate license for each performance broadcast . . . .'" (Pet. App. 14a.) The Second Circuit agreed on this basis that the *K-91* result was correct, and held that the difference in CBS' needs justified a departure from *K-91*. But if, as *K-91* held, the direct licensing alternative saves the blanket license where transaction costs would prohibit direct licensing, then *a fortiori* it saves the blanket license in the network context where the direct licensing alternative is a real constraint on blanket license prices.

would refuse to deal with it if it attempted to obtain direct licenses. The district court found that writers and publishers would readily and willingly negotiate with CBS. (Pet. App. 79a-108a, 111a-120a.) The court concluded that "performance rights to any given type of composition are available from a number of sources if CBS chooses to tap them," (Pet. App. 120a) observing that

> "Copyright proprietors are eager to have their music performed on television not simply to earn performance royalties distributed through ASCAP and BMI, but because a television performance before millions of viewers is the most effective way to sell phonograph records and sheet music, and to generate performances by other music users. No less than eleven witnesses testified to the compelling desire of writers and publishers to gain television exposure for their music."

(Pet. App. 90a-91a.)[23] The court summarized as follows:

> "[T]here is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license."

(Pet. App. 112a.)

The district court thus concluded that since CBS was free to contact writers and publishers directly and since writers and publishers would willingly deal with CBS on a price-competitive basis, CBS was as free to pursue direct licenses as it would be if ASCAP and BMI were not in the market. Their presence in the market is in fact procompetitive; it gives users an additional option—an option free of transaction costs and productive of wide flexibility

[23] The only writer or publisher at trial who testified that his companies would refuse to negotiate direct licenses with CBS was a CBS employee—the vice president of two of the music publishing companies owned by CBS. (Pet. App. 90a.)

in music selection. To drive the blanket license from the market would be plainly anticompetitive.

B. The Useful Role of the Blanket License Has Been Recognized by Every Governmental Body Concerned With Music Licensing.

The useful and necessary role which the performing rights organizations and the blanket licenses they offer play in making possible commerce in performance rights has been recognized by every governmental body which has studied music licensing in recent years.

In the Copyrights Act of 1976, Congress provided for compulsory blanket licensing of certain kinds of secondary transmissions by cable television systems. *See* 17 U.S.C. § 111. The House Report on the legislation stated that blanket licensing was chosen because

> "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."

H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 89 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5704.

In the Copyrights Act, Congress created a Copyright Royalty Tribunal to administer the various compulsory licensing provisions of the Act. *See* 17 U.S.C. §§ 801-10. In providing that the Copyright Royalty Tribunal shall collect and distribute the compulsory fees payable by jukebox operators, Congress expressly mentioned BMI and ASCAP as possible recipients. 17 U.S.C. §§ 116(c)(4), (c)(3).

The government agencies most familiar with the problems facing copyright owners and music users have also

determined that blanket licensing is a reasonable response to those problems. In a 1978 rulemaking proceeding regarding compulsory music licenses for noncommercial broadcasters, the Copyright Royalty Tribunal determined that blanket licensing was

> "the most suitable method for licensing public broadcasting to perform musical works."

43 Fed. Reg. 25,068, 25,069 (1978).

In a report to Congress pursuant to 17 U.S.C. § 114(d), the Register of Copyrights recommended that Congress create performance rights in sound recordings and that the rights be subject to compulsory blanket licensing. 43 Fed. Reg. 12,763, 12,767 (1978).

Finally, the Department of Justice, in consent decrees approved by federal courts, has required that BMI and ASCAP offer blanket licenses. (Pet. App. 6a, 29a-33a.) The Department of Justice has principal responsibility for enforcing the antitrust laws, and BMI has operated under consent decrees virtually since its inception. *United States* v. *Broadcast Music, Inc.*, [1941-1943 Transfer Binder] TRADE REG. REP. (CCH) ¶ 52,516 (E.D. Wis. 1941). While a private litigant is free to challenge practices authorized by a consent decree, *see Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961), the judgment of the Department that blanket licensing is not unreasonable is entitled to respect.

C. The Per Use License Sought by CBS Would Be Inherently Anticompetitive.

The opinion of the Second Circuit suggested that BMI and ASCAP could be allowed to continue offering blanket licenses if they were also

> "required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing."

(Pet. App. 22a.) Because CBS had failed to prove liability, the district court did not need to reach the question of the anticompetitive character of the relief sought by CBS.[24] The trial record, however, demonstrates that, far from achieving a competitive market, the per use license would be a necessarily anticompetitive weapon in the hands of the music user.

The per use license sought would include the following elements: (1) standard rates would be charged by ASCAP or BMI for each type of use;[25] (2) CBS would have the choice of licensing a particular song either through the ASCAP or BMI per use license at the standard fee or directly from the copyright owner at a negotiated fee; (3) the standard per use rates would be adjusted periodically to reflect prices reached in direct licensing transactions. (Pet. App. 38a n.7.)

If it had the alternatives of using a particular song at the standard BMI per use rate or taking a direct license from the copyright owner, CBS would take a direct license only when it could get it for a fee that was lower than the standard per use rate. If CBS could not get a direct license for

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[24] Judge Moore, in his concurring opinion on the appeal, voted to remand the case for relief despite his apparent disagreement that liability had been proven. (Pet. App. 23a.) Obviously, a party is not entitled to relief without proof that its rights have been violated.

[25] Since individually negotiated licenses can be obtained directly from copyright proprietors now, there would be no point in requiring per use licensing by BMI or ASCAP on an individually negotiated basis.

less, it could use the song without the owner's permission by simply paying the per use rate. (3 A. 197-99; 4 A. 334-38; 16 A. 4770.)

The standard per use rate would therefore be a ceiling on the prices that could be charged by the copyright owner for direct licenses. Rather than permitting a copyright owner to negotiate with CBS in a free market by competing against other copyright owners, the per use system would force the owner to compete against himself. And, since per use rates are to be adjusted periodically to reflect amounts paid in direct licensing transactions, the ceiling is designed to be lowered but never raised. This would provide CBS—the largest and most powerful buyer of music in the world—with an economic weapon against writers and publishers unknown in any free market. To achieve such a result in the name of antitrust would be a truly remarkable perversion.[26]

III. THE OFFERING OF BLANKET LICENSES BY BMI DOES NOT CONSTITUTE COPYRIGHT MISUSE BY BMI OR ITS AFFILIATES.

In the final sentence of the last footnote of its opinion, the Second Circuit made a ruling which may have had the effect of rendering unenforceable every musical copyright in the United States. Apparently without considering policy, precedent, or practical effect, the court wrote only that, "We dispose of CBS' claim of copyright misuse in the same manner and for essentially the same reasons as the § 1 claim." (Pet. App. 23a n.29.) Even if it were assumed that the antitrust ruling was correct, this copyright misuse ruling is indefensible.

[26] As an alternative to the issuance of a per use license CBS requested that BMI and ASCAP be enjoined from offering blanket licenses to any television network. (Pet. App. 25a.) This proposal is no less anticompetitive than the per use proposal. CBS' testimony revealed that CBS' goal in seeking an injunction is to deny the other two television networks what they regard as an effective alternative in competing against CBS. (3 A. 84-86; 19 A. D764-65, D877, D1016-17.)

To place the ruling in context, we begin with an analysis of the circumstances under which an antitrust defense may be used to excuse otherwise plainly improper conduct. Ordinarily, it cannot. For example, a defendant sued for goods sold and delivered, or for that matter any other breach of contract, may not escape his obligation to pay by asserting that the plaintiff is guilty of an antitrust violation. *See, e.g., Kelly* v. *Kosuga,* 358 U.S. 516 (1959); *Bruce's Juices* v. *American Can Co.,* 330 U.S. 743 (1947).

The impact of an antitrust-based misuse defense is draconian and quixotic, bears no necessary proportion to the offense, and permits a wrongdoer to go free. As this Court said in *Bruce's Juices, supra,* an antitrust defense could

> "be justified only if it would be at least a rational, nondiscriminatory and appropriate means of making the policy of the statute effective. To allow a buyer to get his goods for nothing . . . does not meet this test.
>
> "It would seem that one test of the rationality and appropriateness of such a defense . . . would be that the reparation it permits should be measured at least roughly by the extent of the injury caused by the violation. This, of course, is the principle of the suit for triple damages. But that is not the principle of the defense here urged. The extent of its indemnity is not measured by injury, and not measured by the dealings affected with the alleged violation. It is measured solely by the amount of credit the buyer ob-

> tained from the seller. . . . Had Bruce's delinquency been greater, so would its gain . . . ."

330 U.S. at 752-53. This rule against permitting a defendant wrongdoer to escape by charging the plaintiff with an antitrust offense extends even to suits where the plaintiff's complaint is of an antitrust violation. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

The only exception to this rule which this Court has recognized is in the patent field. The exception originated in *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488 (1942), where this Court recognized a misuse defense in a suit by the owner of a patent on a machine for dispensing salt tablets who had tied sale of salt tablets to leasing of the machine. This defense meant that the patent owner who was guilty of misuse could not enforce his patent even against an infringer who was not a target of the misuse. While the Court discussed the patent owner's conduct as contravening patent policy, the conduct had antitrust implications as well. In subsequent cases, the misuse doctrine has been employed wherever any antitrust violation by the patent holder has been found; analysis of patent policy as such has not been deemed necessary. *See, e.g., In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Carter-Wallace, Inc.* v. *United States*, 449 F.2d 1374 (Ct. Cl. 1971). While the "far-reaching social and economic consequences of a patent," *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945), may justify the patent misuse exception to "the overriding general policy . . . 'of preventing people from getting other people's property for nothing . . . ,'" *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), there is no warrant for extending this extraordinary weapon to

the far different world of copyrights. *See Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 343 (1971).

There are a few lower court cases on the question whether there is a copyright misuse defense,[27] but none can be said to have resolved the issue. The one case which expressly recognized the competing policies—the Second Circuit's decision in *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)—ducked the question by announcing a balancing test and ruling in favor of the copyright owner.[28]

Analysis of the vast differences between patents and copyrights indicates clearly that the ordinary rule pro-

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[27] For cases stating that copyright misuse is not a defense, *see Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd per curiam sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959); *Buck* v. *Cecere*, 45 F. Supp. 441 (W.D.N.Y. 1942); *Society of European Stage Authors & Composers, Inc.* v. *WCAU Broadcasting Co.*, 35 F. Supp. 460 (E.D. Pa. 1940); *Buck* v. *Spanish Gables, Inc.*, 26 F. Supp. 36 (D. Mass. 1938); *Buck* v. *Newsreel, Inc.*, 25 F. Supp. 787 (D. Mass. 1938); *M. Witmark & Sons* v. *Pastime Amusement Co.*, 298 F. 470 (E.D.S.C.), *aff'd*, 2 F.2d 1020 (4th Cir. 1924); *Harms* v. *Cohen*, 279 F. 276 (E.D. Pa. 1922). *See also Foreign Car Parts, Inc.* v. *Auto World, Inc.*, 366 F. Supp. 977, 979 (M.D. Pa. 1973) ("doubtful" that there is such a defense); *United Artists Associated, Inc.* v. *NWL Corp.*, 198 F. Supp. 953, 958 (S.D.N.Y. 1961) ("substantial question" whether there is such a defense).

For cases stating that copyright misuse would be a defense, *see Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957); *Columbia Pictures Corp.* v. *Coomer*, 99 F. Supp. 481 (E.D. Ky. 1951); *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed per curiam sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

[28] *See generally* Gibbs, *Copyright Misuse: Thirty Years Waiting for the Other Shoe*, 23 ASCAP Copyright L. Symp. 31 (1977); Fine, *Misuse and Antitrust Defenses to Copyright Infringement Actions*, 17 Hastings L.J. 315 (1965); Note, *The Misuse Defense in Copyright Actions*, 37 N.Y.U. L. Rev. 916 (1962); Nicoson, *Misuse of the Misuse Doctrine in Infringement Suits*, 9 U.C.L.A. L. Rev. 76 (1962).

hibiting antitrust defenses should be applied to copyright actions. The leading patents are of overwhelming economic importance, supporting entire industries and hundreds of millions of dollars of capital investment. Access to a whole field of endeavor may be impossible without the right to practice one or more key patents. Misconduct by the holder of patents such as these can have substantial impact on the economy.

A copyright, on the other hand, has no such effect. While a copyright may, like a patent, be of significant value, copyrights do not approach the leading patents in terms of their impact on the market and on others. Unlike the owner of a patent, the owner of a copyrighted song cannot exercise control over any market. Even the most original and outstanding song may be replaced by many other songs under copyright or in the public domain. (Pet. App. 48a, 92a, 119a-120a.) Any composer is free to create a new song on the same subject matter or a song that is otherwise suitable for the uses planned. No copyrighted song has any exclusionary effect on anyone in the business of creating or performing music.

Furthermore, there is generally a vast difference in what is at stake in an infringement suit. Patent infringement suits often involve many millions of dollars; the typical musical copyright claim is likely to involve less than one thousand dollars. If misuse defenses are permitted, every copyright infringement action can be transformed into an expensive antitrust case, dwarfing the value of the typical copyright action. To further expand the "very strange class of private attorneys general," *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959), to include deliberate infringers of copyrights is to threaten destruction of the system of copyright protection Congress has created.

Even if this Court were unwilling to conclude that a misuse defense could never be recognized in a copyright

action, misuse certainly should not be found in the circumstances presented here. All that BMI's affiliates have done is to seek to market their works in the historically accepted manner. Neither the copyright laws, nor the Department of Justice's consent decrees, nor any prior judicial decision had given them any warning that all or any part of the value of their works was subject to forfeiture because of their dealings with BMI. Indeed, each of these authorities indicated that bulk licensing by BMI was a lawful and proper practice.

By its casual misuse ruling, the Second Circuit has threatened the livelihoods of the members of an entire profession. It has jeopardized the rights of the 70,000 writers and publishers who are affiliated with BMI or members of ASCAP, and of the thousands of writers associated with foreign performing rights organizations whose works are made available in this country through BMI and ASCAP. It has imperiled not just their income from the performing rights licensed through BMI and ASCAP,[29] but as well their income from sheet music, synchronization rights, mechanical rights for records and tapes, dramatic rights and performing rights for motion pictures.

The harsh nature of these penalties is exacerbated by the extreme difficulty the writers and publishers would have in purging the misuse so as to enable themselves once again to enforce their copyrights. BMI's affiliates cannot control BMI's licensing practices. To attempt to abrogate their contracts with BMI in order to avoid taint by BMI's practices would be self-defeating, since direct licensing of most music users is impossible.

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[29] A number of music users have already asserted a misuse defense to copyright infringement claims in reliance on the Second Circuit's decision. *See, e.g., Broadcast Music, Inc.* v. *1243-20th Street, Inc., T/A Rocky Racoon's*, No. 77-1385 (D.D.C., consent judgment filed Sept. 19, 1978).

The court below apparently has required a drastic forfeiture of rights for conduct which, if improper at all, would not justify a fraction of the penalty imposed.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with directions that the district court judgment be reinstated with respect to BMI and its affiliates.

Respectfully submitted,

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